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IN THE

Supreme Court of the United States

OCTOBER TERM 1934

No. 817

SUPERINTENDENT FIVE CIVILIZED TRIBES, FOR SANDY FOX, CREEK No. 1263, *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

Your petitioner, Superintendent Five Civilized Tribes, for Sandy Fox, Creek No. 1263, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit in the above entitled case, which was Numbered 1038 on the docket of the Circuit Court of Appeals. The judgment of that court in accordance with the majority opinion was entered January 9, 1935. This judgment (Judge Lewis delivering a dissenting opinion on the merits) denied a petition for review, and affirmed the order of the United States Board

of Tax Appeals. The opinions of the court below (R. 25) are reported in 74 Fed. (2d) —. The opinion of the Board of Tax Appeals (R. 11) is reported in 29 B. T. A. 635. The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

By Federal Statute the real and personal property of all full-blood, allotted, restricted Indians is under the immediate supervision and control of the respective Superintendents of the several Indian Agencies. The income from such property is received and held in trust by such Superintendents and invested by them under the direction of the Secretary of the Interior.

The interest which accrues from such investments is likewise received and held in trust by the respective Superintendents.

The question is whether such "reinvested income" (income from investments) which is thus held in trust by the Superintendents, is taxable under the Federal Income Tax laws.

Although this question comes up on behalf of a single restricted Indian of the Five Civilized Tribes, it is of importance to all restricted Indians of all tribes, since it will determine the tax status of their refunds or assessments for prior years and for years to come.

STATUTES AND REGULATIONS INVOLVED

The pertinent parts of the Revenue Act involved will be found in Appendix A, *infra*, p. 13. The pertinent statutes relating to taxation of members of the Five Civilized Tribes will be found in Appendix B, *infra*, p. 16.

STATEMENT

Sandy Fox is an allotted, fullblood, restricted, Creek Indian, whose property both real and personal is under the direct supervision and control of the Superintendent of the Five Civilized Tribes and the Secretary of the Interior. The income from his allotment is received and held in trust by the said Superintendent and invested by him under the direction of the Secretary of the Interior. The income interest from such investments is likewise received and held in trust as part of petitioner's restricted funds and property.

For the calendar year 1929 the Superintendent filed for Sandy Fox an income tax return and paid a tax of $102.59 from the restricted funds of petitioner in his possession. Reported in this return for 1929 was an item of income in the sum of $7,797.42 received by said Superintendent as interest from the investment of petitioner's restricted funds. The return also included an item of $8,351.75 received by the said Superintendent as interest on Liberty Bonds held by him as part of petitioner's restricted funds. Both of these items of income, in turn, became a part of petitioner's restricted funds.

During the year 1929, the Commissioner of Internal Revenue under authority of Treasury Decision 3570 (Cum. Bulletin III-1, p. 85) refunded to said Superintendent for Fox taxes, erroneously paid by the Superintendent on the income from Fox's allotment, with interest as provided by law:

Year	Tax	Interest
1914	$ 95.43	$ 79.15
1915	858.24	637.60
1916	3,396.31	2,400.75
Total	$4,349.98	$3,117.50

This interest in the sum of $3,117.50 is also a part of petitioner's restricted funds and was not included in petitioner's tax return. The Commissioner of Internal Revenue, however, increased the income reported on the return by this sum and determined a deficiency of $167.00.

In a review before the Board of Tax Appeals petitioner resisted the deficiency thus determined and sought a recovery of the $102.59 previously paid on the theory that he was not subject to the federal income tax laws in respect to the income in question under authority of *Blackbird v. Commissioner* (C. C. A. 10) 38 F. (2d) 976; reversing 14 B. T. A. 1247, in which case the Solicitor General did not seek a review by this court.

The Board of Tax Appeals denied petitioner's contention 29 B. T. A. 635 (R. 11), and approved the action taken by the Commissioner of Internal Revenue on authority of its earlier decision in *Snell v. Commissioner* 10 B. T. A. 1081, asserting that the holding in the *Blackbird Case, supra*, was somewhat modified by this Court's opinion in *Choteau v. Burnet* 283 U. S. 691.

The Court of Appeals in its majority opinion respecting (to use its language R. 25) "this close and difficult question," asserts that *Blackbird v. Commissioner, supra*, authoritatively decided "that income received from his allotment, and income received by him from tribal property held in trust is not subject to income tax." But whether the interest income from the investment of this nontaxable income which is likewise restricted, is taxable

"has not been before the courts."

The court then states that the whole question is one of statutory construction and after recognizing the power of Congress to tax the income of an Indian from any source, states: (R. 30).

"While the question is not free from doubt, we are of the opinion, that, as construed by the Supreme Court, the intent of Congress was to subject the income from investments of surplus funds, as well as the investments themselves, to taxation."

Judge Lewis in dissenting states that the majority decision in this case is "contrary" to *Blackbird v. Commissioner, supra.* He could see no material difference between Blackbird and her property on the one hand and Fox and his property on the other. Further, he stated that "not only does the majority opinion overrule the Mary Blackbird case, it also disregards the wholesome doctrine of *stare decisis.*" (R. 33.)

SPECIFICATIONS OF ERRORS TO BE URGED

1. The Court below erred in holding that Congress intended to impose an income tax on the restricted income received and held by the Superintendent of the Five Civilized Tribes when the income arises from the investment by him, subject to the direction of the Secretary of the Interior, of a restricted, full-blood Indian's restricted property.

2. The Court below erred in holding that its earlier decision in *Blackbird v. Commissioner* 38 F. (2d) 976 did not decide the question herein presented.

3. The Court below erred in affirming the order of the United States Board of Tax Appeals.

REASONS FOR GRANTING THIS WRIT OF CERTIORARI

1. The majority opinion below is contrary to this Court's decisions in earlier cases.

In *Elk v. Wilkins* 112 U. S. 94,100, it is stated:

> "General Acts of Congress do not apply to Indians, unless so expressed as to clearly manifest an intention to include them."

Federal income tax laws are general acts of Congress and the rule above set out is particularly applicable, where, as here, Congress has dealt specially respecting taxation of allotments of members of the Five Civilized Tribes. [Act of May 27, 1908, (35 Stat. 312.)] By the terms of this Act restrictions on allotments are removed under certain conditions and coincident with the removal of restrictions, the allotments become taxable under the provisions of Sec. 4 of said Act.

The general policy of the Federal Government has been, not to impose a Federal Income Tax upon the income derived from the restricted lands of a restricted Indian. Inalienability and non-taxability are natural concomitants, otherwise involuntary sales of property to satisfy tax obligations could be effected. It is the removal of restrictions (unless a right of non-taxability exists by treaty or contract) that subjects an Indian's property to taxation and this construction is specifically enacted as Section 4 of the Act of May 27, 1908, *supra*. See also *Choate v. Trapp* 224 U. S. 665, 675.

In *Bagby v. United States* (C. C. A. 10) 60 F. (2d) 80 and in *Pitman v. Commissioner* (C. C. A. 10) 64 F. (2d) 740, involving members of the Five Civilized Tribes, it was held that restrictions had been removed from the allotments in question and by reason thereof rents or royalties from these allotments were income subject to the federal income tax, by virtue of Sec. 4 of the Act of May 27, 1908.

In *Choteau v. Commissioner* (C. C. A. 10) 38 F. (2d) 976, affirmed 283 U. S. 691 (involving an Osage Indian) a certificate of competency had been issued under the Act of June

28, 1906 (34 Stat. 539) which removed the restrictions from his allotment, and this Court stated (p. 695):

> "Since 1910, when he received his certificate, petitioner has *therefore* been taxable upon his allotted lands, except his homestead." (Italics supplied.)

With respect to the income received by Choteau it was noted that it was clearly beyond the control of the United States and that his right to receive and use it was absolute. Restrictions had been removed; this Court holding (p. 696):

> "The claim that with respect to this income the petitioner was restricted, and therefore exempt from the tax laid by Sections 210 and 211 (a) [40 Stat. 1062] must fail."

In the instant case restrictions exist both as to Sandy Fox and all his property, real and personal. His property is under the direct supervision of the Superintendent of the Five Civilized Tribes, subject to the direction of the Secretary of the Interior. The income from his allotment, and the income from investments are both received and held in trust by the said Superintendent as part of petitioner's restricted funds and property.

The question of taxation relates to the income received by the Superintendent from the investment of petitioner's restricted funds [income from his allotment] it having been decided that the income from the allotment is non-taxable (34 Ops. A. G. 275, published as T. D. 3570, C. B. III-I, p. 85).

In *Blackbird v. Commissioner* (C. C. A. 10) 38 F. (2d) 976, certiorari not requested, it was held that the income of a restricted Osage Indian, (without a certificate of com-

petency), was not within the purview of the income tax laws, the court stating (p. 978):

> "We cannot agree that because the income statute, Act of 1918 (40 Stat. 1057), and Act of 1921 (42 Stat. 227), subjects the net income of every individual to the tax, this is alone sufficient to make the Acts applicable to her."

2. The court below erred in concluding (R. 30):

> "While the question is not free from doubt, we are of the opinion that, as construed by the Supreme Court, the intent of Congress was to subject the income from investments of surplus funds, as well as the investments themselves, to taxation."

In 34 Ops. A. G. 275, it was held that income from allotments, such as petitioner's, was not subject to taxation. In making refunds under authority of this opinion, there arose the question as to whether the Government should invoke the provisions of the revenue laws requiring the filing of timely claims for refund. In answering this question in the negative, the then Attorney General (now Mr. Justice Stone) appropriately stated (34 Ops. A. G. 302, 305):

> "Moreover, inasmuch as *the income tax statutes do not apply to the class of Indians under discussion*, I see no reason why the limitation clauses therein contained relative to claims for refund or abatements should be invoked against them." (Italics supplied.)

and in 34 Ops. A. G. 439, 445 it was said:

> "In order to make this restriction against alienation properly effective, it would seem that *inalienability and nontaxability should go hand in hand*, at least until Congress clearly provides otherwise. At any rate, I am unable, by implication, to impute to Congress under the broad language of our Internal Revenue Acts an

> intent to impose a tax for the benefit of the Federal Government on income derived from the restricted property of these wards of the nation; property the management and control of which rests largely in the hands of officers of the Government charged by law with the responsibility and duty of protecting the interests and welfare of these dependent people. *In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian.*" (Italics supplied.)

In holding that the income derived from the restricted lands of the Kaw Indians is not subject to the federal income tax laws, the Attorney General (35 Ops. A. G. 1, 5) among other things said:

> "Whatever right the Act of May 27, 1924, may have conferred upon the State of Oklahoma to tax the mineral production of the lands of the Kaws, it cannot be taken as indicating an intention on the part of Congress to subject the income derived from these lands to Federal taxation. Such a wide departure from the prior legislative policy should not be assumed from doubtful implication, but should be recognized as existing only upon the enactment of legislation expressly so providing."

The majority below in deciding the question in the case:

> "which has not been before the Courts"

rely upon, *United States v. Gray* (C. C. A. 8) 284 F. 103, *United States v. Ransom* (C. C. A. 8) 284 F. 108; *United States v. Mummert* (C. C. A. 8) 15 F. (2d) 926; and *Shaw v. Oil Corporation* 276 U. S. 575; state that the restricted status of the lands in those cases did not exempt them from state taxation; that they could see no tenable distinction between land and personal property, and conclude (R. 30):

> "If Congress intended that such investments should be subject to state taxation, we can see no reason for

> holding that it intended to exempt the income from such investments from federal taxation."

In each of the cases relied upon by the court to support its conclusion, the lands purchased with restricted funds were at the time already taxable lands within the state. Under such circumstances, it is evident that exemption from taxation should not be implied. To exempt these taxable lands from state taxation merely because the Secretary of the Interior required that the deed of conveyance should provide for inalienability on the part of the Indian for a period of years, would, as this court pointed out in *Shaw v. Oil Corporation* at page 581 of 276 U. S.:

> "present the curious paradox that the Secretary by a mere conveyancer's restriction, permitted by Congress, had rendered the land free from taxation * * *"

On the other hand it has been decided in an unreported decision that where non-taxable, restricted lands are purchased with restricted funds under a deed imposing similar restrictions on the purchaser, such lands continue to be exempt from taxation. *Marble v. King*, et al., No. 900 Equity, decided August 1934 by the District Court, for the Northern District of Oklahoma. This decision was not appealed and is printed in appendix C of this brief, *infra*, (p. 22).

When restricted Indian property has always been non-taxable it is for Congress to state when and upon what conditions the property becomes taxable. In the instant case the tax exemption necessarily incident to such restricted property has not been removed or rendered taxable by any act of Congress. As stated by Judge Lewis in his dissent* (R. 33):

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*Judge Lewis' dissenting opinion on the merits appears in full in the appendix to this brief, *infra*, (p. 18). It will be noted that he suggests a question of jurisdiction as to whether the parties are adversaries in a case or controversy or whether being officers of the United States Government they are only seeking advisory instruction.

"It may also be conceded that Congress may confer on the Secretary of the Interior, or other officials, power to remove from the lands of an Indian exemption from taxation, and when so removed from such lands or other property it becomes subject to taxation by state and nation. *Action removing the exemption by either method expresses a clear intention by Congress to render the Indian's property subject to taxation. There could be no other intention.*" (Italics supplied.)

3. This question of Federal Taxation is not limited to

The relationship between the Government and Sandy Fox admittedly is that of guardian and ward. *Tiger v. Western Investment Co.* 221 U. S. 286. His property is under the immediate supervision of the Superintendent of the Five Civilized Tribes. (Stip. of Facts, R.10, Sec. 17, Ch. 222, Act of August 1, 1914, 38 Stat. 582,598).

By a ruling of the Bureau of Internal Revenue, a tax return was required by the Superintendent of the Five Civilized Tribes, for Sandy Fox; IT. 1366, C. B. I-I, Jan.-June, 1922, page 242, which provides in part:

> "In such a case the return should be made by the office of Indian Affairs, by its local superintendent or agent on behalf of the *Government as trustee* and the tax assessed upon such return should be paid by the superintendent or agent who makes the return." (Italics supplied.)

In the event the income in question is taxable this ruling is applicable for the year 1929 under Section 143 (a) of the Revenue Act of 1928, C. 852, 45 Stat. 791 which among other things provides that every fiduciary shall make a tax return for all individuals for whom he acts when the income is in excess of the credits properly allowable.

The style of this proceeding is governed by Rule 6 of the United States Board of Tax Appeals, which rule provides in part:

> "the proceedings shall be brought by and in the name of the person against whom the deficiency * * * is asserted by the Commissioner * * * If a fiduciary, both the names of the fiduciary and of the * * * other person for whom he acts shall be used."

In this case the notice of deficiency was directed to the Superintendent of the Five Civilized Tribes, for Sandy Fox, and the proceeding was properly instituted in that style. (See Board Tax Appeals discussion on this point 29 B. T. A. 635, 637, R. 13.) Fundamentally the question of taxation is between the United States and its ward, Sandy Fox. The fact that the Superintendent of the Five Civilized Tribes is a required party to the pleadings is incidental. The form is that prescribed by statute and arises solely from the relationship of guardian and ward. The existence of this guardianship is not an obstace to prevent the judicial determination of his rights.

members of the Five Civilized Tribes, but is of general interest to the restricted Indians, as it affects many others in the various tribes. It will apply to refunds or assessments for prior years, depending on whether tax returns have been filed, and will govern the tax status of restricted Indians for years to come. In addition to the Indians' interest, a compliance with the majority opinion below will cause considerable expense to the Bureau of Indian Affairs, including changes in the present methods of accounting at the various Agencies. It is, therefore, submitted that the importance of the question justifies a review by this Court.

CONCLUSION

For the reasons stated the writ prayed for should issue.

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March 26, 1935.

APPENDIX A

REVENUE ACT AND REGULATIONS INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 11. NORMAL TAX ON INDIVIDUALS.

There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax * * *

SEC. 12. SURTAX ON INDIVIDUALS.

(a) Rates of surtax. There shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax * * *

SEC. 22. GROSS INCOME.

(a) General definition. "Gross Income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

SUPPLEMENT E—ESTATES AND TRUSTS

SEC. 161. IMPOSITION OF TAX.

(a) Application of tax. The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, * * *

* * * * *

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) Computation and payment. The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and Section 167 (relating to income for benefit of grantor). For return made by beneficiary, see Section 143.

SEC. 143. FIDUCIARY RETURNS.

(a) Requirement of return. Every fiduciary • • • shall make under oath a return for any of the following individuals, estates, or trusts for which he acts, stating specifically the items of gross income thereof and the deductions and credits allowed under this title.

(1) Every individual having a net income for the taxable year of $1,500 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband or wife;

• • • • •

(4) Every estate or trust the net income of which for the taxable year is $1,500 or over; • • •

Treasury Regulation 74, promulgated under the Revenue Act of 1928:

Art. 741. Fiduciary returns. Every fiduciary, • • • must make a return of income—

(a) For the individual whose income is in his charge if the gross income of such individual is $5,000 or over, or if the net income of such individual is $1,500 or over if single or if married and not living with husband or wife, or if such individual is married and was living with husband or wife for the entire taxable year and the aggregate gross income of both husband and wife is $5,000 or over, or the aggregate net income of both husband and wife is $3,300 or over, or if such individual

is married and was living with husband or wife for a period less than the entire taxable year and the aggregate gross income of both husband and wife is equal to, or in excess of, the credit allowed them by section 25 (c) (2), or

(b) For the estate or trust for which he acts if the net income of such estate or trust is $1,500 or over, or if the gross income of the estate or trust is $5,000 or over, regardless of the amount of the net income, or if any beneficiary of such estate or trust is a nonresident alien.

The return in case (a) shall be on Form 1040 or 1040 A. In case (b) a return is required on Form 1040 with respect to any taxable net income of the estate or trust computed in accordance with Section 162 and a return on Form 1041 with respect to any income deducted under Section 162 (b) or (c). If a portion of the income of the estate or trust is retained by the fiduciary and the remainder is distributable or distributed to beneficiaries, both Forms 1040 and 1041 will be required. * * *

APPENDIX B

LEGISLATION PERTAINING TO TAXATION OF ALLOTTEES OF THE FIVE CIVILIZED TRIBES

Act of May 27, 1908, c. 199, 35 Stat. 312:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. * * *

Sec. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which

restrictions have been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided*, that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: • • •

• • • • •

Sec. 4. That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: *Provided*, That allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts theretofore expressly permitted by law.

• • • • •

Sec. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land, • • •

Act of May 10, 1928, 45 Stat. L. 495:

Sec. 3. That all minerals, including oil and gas produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full blood heirs or devisees of such lands, shall be subject to all State and Federal taxes of every kind and character the same as those produced from lands of other citizens of the State of Oklahoma.

APPENDIX C

DISSENTING OPINION OF JUDGE LEWIS ON THE MERITS

Lewis, Circuit Judge.

I suggest a question of jurisdiction, and am inclined to the belief that power in this court to review the Board's order does not exist. We have this anomalous procedure: The Superintendent of the Five Civilized Tribes filed a petition for review. He is an officer in the Interior Department. Counsel who represent him were employed by the Interior Department. Respondent, Commissioner of Internal Revenue, is also an officer in an executive department of the government, and he is represented by counsel in that department. Petitioner contends that Sandy Fox, an Indian whom he professes to represent, and his property are not subject to an income tax, and respondent contends to the contrary. Is this a case or controversy over which this court has jurisdiction? In Old Colony Tr. Co. v. Comm'r. Int. Rev., 279 U. S. 715, the court in construing the act conferring jurisdiction on Circuit Courts of Appeal to review the orders of the Board of Tax Appeals quoted with approval this from the opinion of Mr. Justice Field in 32 Fed. 241, 255:

> "The judicial article of the Constitution mentions cases and controversies. * * * The term (case) implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication."

The Chief Justice then said:

> "The Circuit Court of Appeals is a constitutional court under the definition of such courts as given in

the Bakelite case, supra, and a case or controversy may come before it, provided it involves neither advisory nor executive action by it.

"In the case we have here, there are adverse parties. The United States or its authorized official asserts its right to the payment by a taxpayer of a tax due from him to the Government, and the taxpayer is resisting that payment or is seeking to recover what he has already paid as taxes when by law they were not properly due. That makes a case or controversy, and the proper disposition of it is the exercise of judicial power."

So the question arises whether the parties are adversaries in a case or controversy within our jurisdiction or whether being officers of the United States government they are only seeking advisory instructions.

But on the merits I disagree with the conclusion reached by my associates. The Act of May 27, 1908 (35 Stat. 312) applies to the Five Civilized Tribes. We held in Bagby v. United States, 60 F. (2) 80, and in Pitman v. Comm'r. Int. Rev., 64 F. (2) 740, that under the facts in each of those cases said act removed the restrictions from the allotments there under consideration, that such removal rendered each of said allotments subject to taxation, and that the rentals or royalties from said allotments were income subject to federal income tax. We further held in Chouteau v. Comm'r. Int. Rev., 38 F. (2) 976, that a certificate of competency issued to and held by Chouteau under section 2 of the Act of June 28, 1906 (34 Stat. 539) removed the restrictions from his allotment and perforce thereof from his income therefrom and rendered said income subject to federal taxation; that said certificate exempted Chouteau and his property from federal supervision, excepting his homestead; that it gave him full power to use and dispose of his property according to his own judgment and thus

there was imposed on him and he assumed the same burden as other individual property owners. The Supreme Court affirmed our judgment in the Chouteau case. Choteau v. Comm'r., 283 U. S. 691. It may also be conceded that Congress may confer on the Secretary of the Interior, or other officials, power to remove from the lands of an Indian exemption from taxation, and when so removed from such lands or other property it becomes subject to taxation by state and nation. Action removing the exemption by either method expresses a clear intention by Congress to render the Indian's property subject to taxation. There could be no other intention.

Sandy Fox, the taxpayer, is a full-blood Creek Indian enrolled as a member of that tribe under a given number. It was tipulated that he and his property, both real and personal, are restricted, and that his property is under the direct supervision of the Superintendent of the Five Civilized Tribes subject to the direction of the Secretary of the Interior; that income from his allotment is so received and held; that interest on such income when invested is likewise received and held in trust as a part of his restricted funds and property. There has been no removal of restrictions as to him or his property. Nevertheless the Board held said income to be taxable. I think the Board erred. We held to the contrary in Mary Blackbird v. Comm'r. Int. Rev., 38 F. (2) 976. I can add nothing to what we said in her case. She was a full blood member of the Osage tribe. Her property from which income was received was restricted, and she did not have a certificate of competency. Like Fox, she was a ward of the government of the United States, and, like him, she had no other guardian. We held she was not subject to the tax. I can see no material difference between her and her property on the one hand and Fox and his property on the other as to the point here involved. Not only does the majority opinion overrule the Mary Blackbird

case, it also disregards the wholesome doctrine of *stare decises*.

It is the duty of a trustee to invest funds in his hands. 1 Perry on Trusts, 5th Ed., Sec. 452. Interest received by him should be added to the trust estate. United States v. Brown, 8 F. (2) 567.

It is true that the rights and duties of citizenship were conferred on Fox by section 6 of the Act of February 8, 1887 (24 Stat. 388), as amended by the Act of March 3, 1901 (31 Stat. 1447); but it was appropriately said by the Eighth Circuit in United States v. Gray, 201 Fed. 291, 293:

> "The civil and political status of the Indians does not condition the power of the government to protect their property or to instruct them. Their admission to citizenship does not deprive the United States of its power, nor relieve it of its duty, to control their property, to protect their rights to it from the rapacity and faithlessness of the members of the superior race, to discharge faithfully its legal and moral obligations to them, and to execute every trust with which it is charged for their benefit."

See also National Bank v. Anderson, 147 Fed. 87, 90.

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE NORTHERN DISTRICT OF THE STATE OF OKLAHOMA

No. 900 Equity

L. H. MARBLE, *Plaintiff*,

vs.

JAMES KING, DOLLIE KING, HENRY KING, MRS. HENRY KING AND BOARD OF COUNTY COMMISSIONERS OF MAYES COUNTY, OKLAHOMA, *Defendants*,

UNITED STATES, *Intervenor*.

DECREE

Now on this the ..... day of August, the same being a day of the Special March 1934 Term of this Court, the above entitled cause comes on to be determined, plaintiff appearing by his attorney, R. A. Wilkerson, and the defendants, James King and Dollie King and the Intervenor, the United States, appearing by Chester A. Brewer, Assistant United States Attorney for the Northern District of Oklahoma; and said cause having been submitted to the Court on an agreed stipulation of facts and briefs of the parties hereto; and upon consideration of the pleadings and the agreed stipulation of facts and briefs of the respective parties herein the Court finds, adjudges and decrees as follows:

That James King is a full-blood, restricted Cherokee Indian, and is enrolled as such on the final authenticated Rolls of the Cherokee Nation opposite Roll No. 29681.

That as such full-blood, restricted Cherokee Indian he received a homestead allotment deed, approved by the Secretary of the Interior, conveying to him the following described land, to-wit:

> Northwest Quarter of Northeast Quarter and East Half of Northeast Quarter of Northwest Quarter and North Half of Northeast Quarter of Northeast Quarter and Southwest Quarter of Northeast Quarter of Northeast Quarter of Section 15, Township 21 North, Range 21 East, less roadway, located in Mayes County, Oklahoma.

That the restrictions of the said James King have not been removed except as hereinafter set out.

That Dollie King is a full-blood, restricted Cherokee Indian, and her name appears on said rolls opposite No. 25932. That on and prior to March 20, 1915, there was on deposit in the Indian Department, to the credit of the said Dollie King, the sum of $600.00 which had been placed to her credit in lieu of an allotment. That under the supervision of the Secretary of the Interior, and pursuant to his order, the said sum of $600.00 was invested in the land hereinabove described in behalf of the said Dollie King, and said sum was used to pay the full purchase price of said land to James King. That said James King, under the supervision of the Secretary of the Interior, executed to Dollie King a warranty deed conveying said land which deed was approved by the Secretary of the Interior. That said deed contained a restrictive clause, restricting said land against alienation without the approval of the Secretary of the Interior. That the Secretary of the Interior conditionally removed the restrictions against the alienation of said land for the purpose only of the execution of the deed from James King to Dollie King.

The Court further finds that the above described land was not subject to taxation on March 20, 1915, or prior thereto. That said land was placed on the tax rolls of Mayes Country, Oklahoma, for the year 1916 and subsequent years, and was sold to Mayes County,

Oklahoma, for taxes at a resale tax sale. That thereafter a deed was issued and delivered to the plaintiff, L. H. Marble, by the Chairman of the Board of County Commissioners of Mayes County, Oklahoma, conveying to the said L. H. Marble the land hereinbefore described.

The Court further finds that the $600.00 which was paid by Dollie King to James King as a consideration for the land involved herein were trust funds and under the supervision and control of the Secretary of the Interior. That the land involved was not, at the time of the execution of the deed by James King to Dollie King, subject to taxation by the State of Oklahoma, and has not been subject to taxation by the State of Oklahoma at any time since or prior thereto.

The Court further finds that the plaintiff, L. H. Marble, voluntarily paid the sum of $90.00 to Mayes County, Oklahoma, for a tax deed to said land and voluntarily expanded the sum of $5.00 in procuring said tax deed; that in said action the plaintiff made the Board of County Commissioners of Mayes County, Oklahoma, a party defendant and asked for judgment against it for the sum of $95.00 together with the costs of this action. The Court further finds that the said Board of County Commissioners of Mayes County, Oklahoma, was duly served with summons in said cause; that it has made default and is now in default in said action. That in addition to the said service of summons, the plaintiff has caused notice to be given to the acting County Attorney of Mayes County, Oklahoma, that he would ask for judgment against said Board of County Commissioners for the said sum of $95.00 together with the costs of said cause.

The Court further finds that by reason of the foregoing the plaintiff, L. H. Marble, is not entitled to the relief prayed for in the bill of complaint as to the defendants James King, Dollie King, Henry King and Mrs. Henry King, and that the title to said land should be quieted in the defendant Dollie King free and clear of all rights and claims of the plaintiff. That as against the defendant, Board of County Commissioners

of Mayes County, Oklahoma, the plaintiff is entitled to judgment in the sum of $95.00 and for the costs of said cause.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiff, L. H. Marble, be and he hereby is denied the relief prayed for in the bill of complaint herein as against the defendants, James King, Dollie King, Henry King and Mrs. Henry King, and that the tax deed under which said plaintiff claims title to the following described real property situated in Mayes County, Oklahoma, to-wit:

> Northwest Quarter of Northeast Quarter and East Half of Northeast Quarter of Northwest Quarter and North Half of Northeast Quarter of Northeast Quarter and Southwest Quarter of Northeast Quarter of Northeast Quarter of Section 15, Township 21 North, Range 21 East, less roadway

which said deed was dated December 5, 1932, and recorded December 12, 1932, in Book 180 at Page 426 of the records of said County, be and the same is hereby cancelled, set aside and held for naught. It is further ordered, adjudged and decreed that all taxes levied against the above described restricted land for the years 1918 to 1929 inclusive be and they are hereby declared null and void and cancelled; that the title to the land hereinabove described be and the same is hereby quieted in the name of Dollie King, a full-blood restricted Cherokee Indian, Roll No. 25932.

IT IS THE FURTHER ORDER OF THE COURT that the plaintiff, L. H. Marble, have and recover of and from said Board of County Commissioners of Mayes County, Oklahoma, the sum of $95.00 together with the costs of this cause.